SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 329

ZOLA BURDON, Administratrix of the Estate of Robert Burdon, Deceased,

Petitioner,

vs.

CLARENCE WOOD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

I.

The Opinion.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, which the petitioner seeks to have reviewed, is found in the Transcript of Record at pages 129 to 134. It is reported in 142 F. (2d) 303.

II.

A Concise Statement of the Grounds Upon Which the Jurisdiction of This Court Is Invoked.

This statement is set out in the preceding petition under Part II thereof. For all purposes, the statement given in Part II may be considered adopted and made a part of this brief by reference.

III.

A Concise Statement of the Case Containing All That Is Material to the Consideration of the Questions Presented.

While it is true that the petitioner takes exception to the opinion of the Circuit Court of Appeals herein raising three questions for review, they being:

1. That the opinion of the Circuit Court of Appeals for the Seventh Circuit was at variance with the decided law of the forum.

2. That the opinion of the Circuit Court of Appeals for the Seventh Circuit was at variance with the decided law of other Circuit Courts of Appeals as it pertains to the precise question present; and

3. That the opinion of the Circuit Court of Appeals for the Seventh Circuit was at variance with the decided law of this Court as it pertains to the question of evidence presented;

there is actually but one central question involved.

In this case, the petitioner-plaintiff made a prima facie case, due to the fact that the respondent-defendant admittedly shot and killed Robert Burdon. Such a prima facie case raises the presumption of wrongfulness. The burden of proof then passed to the respondent-defendant to show

justification for the killing of Robert Burdon. In the trial of this case, the petitioner-plaintiff was required to call as witness the respondent and his employees who were the only available witnesses of the shooting out of which suit arose. These adverse witnesses testified to the effect that the shooting of the petitioner-plaintiff's decedent was justified by reason of the fact that it was done in self-defense; but these same adverse witnesses testified to certain material facts surrounding the shooting which only served to substantiate the petitioner-plaintiff's position and her prima facie case.

Further, the petitioner-plaintiff, through the testimony of disinterested witnesses, all as recited in the Statement of Facts, contained in Part I of the Petition, placed the credibility of the respondent and his employees at issue. The physical facts surrounding the shooting, all as pointed out in the Statement of Facts contained in Part I of the Petition, actually served to discredit and refute the testimony of these adverse witnesses, the respondent and his employees.

The defendant-respondent and his employees all testified to the same set of facts pertaining to the circumstances surrounding the shooting. They built up a story to support the justification of the shooting in self-defense which falls because certain parts of the story were proven by the evidence in the case to be physically impossible. They testified that Robert Burdon and the defendant, Clarence Wood, were at least sixteen feet apart when the shooting occurred. The uncontradicted evidence was that there were powder burns on the face of Burdon. The ballistics expert witness, put on the stand by the plaintiff, testified that it was impossible for powder burns to be made by a gun similar to that used by Wood at more than one foot. This part of the testimony of the defendant, Clarence Wood, and his em-

ployees was therefore proven to be false, and the jury had a right, therefore, not only to disbelieve that part of the testimony of the defendant and his employees, but had a right to disbelieve all of their testimony. On this issue, alone, the plaintiff had a right to have the case submitted to the jury and the jury had the sole right to consider the credibility of the witnesses and the weight of their testimony.

The defendant, Clarence Wood, and his employees, testified that Robert Burdon, fired one shot from his gun at the defendant, Clarence Wood, and that that shot went into the door jamb, or 2x4, directly behind where the defendant was standing. Merle Wood, one of the defendant's employees, and also a cousin of the defendant, testified that he dug out that bullet and threw it away. Thus, the very evidence which would have absolutely proven that Robert Burdon did fire his gun was destroyed and kept from the authorities. This particular point is very important, in view of the fact that the plaintiff introduced witnesses who testified that Robert Burdon always carried his gun with one fired shell in it, and the sheriff testified that there was only one fired shell in Burdon's gun when he examined it after Burdon was killed. This was all evidence which was pertinent to the case and which properly was to go to the jury. The jury was the only one that could properly consider the weight of this testimony and had a right to consider it also in considering the credibility of the witness.

There was also testimony by competent witness that the bullet hole in the door jamb back of the defendant, Clarence Wood, which bullet hole was supposed to have been made by a shot fired from Burdon's gun, was a smooth hole, whereas evidence showed that if the hole had been made by a bullet from Robert Burdon's gun, it would have been a jagged and uneven hole. This was clearly evidence

which the jury had a right to consider and which contradicted the testimony of the defendant and his employees.

The above evidence is all evidence which the jury had a right to take into consideration in considering the circumstances of the shooting, and which bore on the credibility of the witnesses and the weight of their testimony and which tended to discredit and refute the testimony of the defendant and his employees. In other words, the jury had a right to believe from this evidence, together with other evidence in the case, that the testimony of the defendant and his employees was false.

It is the contention of the petitioner that since she made a prima facie case, and since that prima facie case entitled her to the presumption which it raised, and since the material facts surrounding the shooting, as well as the testimony of the witnesses she produced, actually served to rebut and counter the testimony of the respondent-defendant and his employees to the effect that the killing was justified, a question was presented which could only be passed on by the jury and that therefore, the Honorable Robert C. Baltzell, District Court Judge for the Southern District of Indiana, properly submitted the case to the jury. It is further contended that the relevant and material evidence produced in support of the prima facie case made by the plaintiff, constituted sufficient evidence to justify the trial judge in sustaining the verdict of the jury, once it had been returned. In fact, it is the contention of the petitioner-plaintiff that the material and relevant evidence in support of the presumption raised by her prima facie case was of such force and effect and constituted the means whereby the jury was required to discredit and disbelieve the testimony of the biased and interested witnesses, Clarence Wood, and his employees.

IV.

A Specification of the Assigned Errors Which Are Urged.

This specification is set out in preceding Part III of this brief and under Part III of the preceding petition. Part III of the preceding petition may be considered hereby adopted and made a part of this brief by reference.

V.

THE ARGUMENT.

Summary of the Argument.

Your petitioner will discuss the three assigned questions presented in Part III of the preceding petition under three separate sub-sections, to be entitled A, B, and C. Subsection D of this argument will be addressed to the marked similarity of the law in both State and Federal jurisdictions as it applies to the precise questions presented.

It may at this point be stated that your petitioner has digested all of the cited authorities of the appellant in his brief to the Circuit Court of Appeals for the Seventh Circuit, as well as the authorities cited as controlling, in the opinion of the Circuit Court of Appeals. Your petitioner has no quarrel with the authorities cited either by the appellant in the court below or by Mr. Justice Minton in the opinion of the Circuit Court of Appeals. However, it should at this point be stated that the authorities so cited do not pertain to the precise situation involved in this case, by reason of the fact that these authorities all pertain to cases in which a plaintiff sought by mere presumption, alone, to make out a case, and in which there was uncontradicted and unrebutted evidence presented by the defendants clearly refuting the presumptions relied upon.

These authorities miss the point involved in the instant

case entirely, by reason of the fact that the petitioner-plaintiff herein did not attempt to stand on mere presumption, alone, but instead, presented material and substantial evidence in support of her prima facie case which had raised the presumption in her favor and which material and substantial evidence rebutted the testimony of the adverse witnesses herein. It is the petitioner-plaintiff's contention that a jury question was thus presented, and that the trial court was required to let the jury pass upon the facts.

Cases cannot be lightly taken from jurors who are the recognized triers of questions of fact. On a motion for directed verdict, the court must accept as true all facts which evidence tends to prove and draw against the movant all reasonable inferences most favorable to the party opposing the motion, and if the evidence is such that reasonable men may reach different conclusions, the case should be submitted to the jury.

Worchester, et al. v. *Pure Torpedo Co.* (7 Cir., Feb. 4, 1944) 140 F. (2d) 358, 359.

A.

A Federal Court sitting in the State of Indiana will apply the laws of the State of Indiana as to all questions of presumption, burden of proof and the rules of evidence.

Sampson v. *Channel*, 110 F. (2d) 754, 128 A. L. R. 394; Writ of Cert. Den. 310 U. S. 650, 60 S. Ct. 1099.

Proposition I.

The law of Indiana is established that the burden of proof is governed by the laws of the forum.

Chicago, etc. Co. v. *Vandenburg*, 164 Ind. 470, 488, 73 N. E. 990;

Cleveland, etc. R. R. Co. v. *Wolf, Admr.*, 189 Ind. 585, 590, 128 N. E. 38, 128 N. E. 695;

Smith v. *Wabash*, 141 Ind. 92, 105.

PROPOSITION II.

Under the law in the State of Indiana, justification for assault and battery, or the defense of self-defense in civil cases must be specially pleaded and the presumption is that the act of assault was unlawful and the burden of justifying his conduct is placed upon the defendant.

In the case of *Cleveland, etc. R. Co.* v. *Hadley*, 170 Ind. 204, the court said:

> "A prima facie case having been made out by the aid of the legal presumption of negligence, appellant had the burden of establishing the existence of all the separate collateral facts, which might be necessary to explain the cause of the accident and to demonstrate the use of proper diligence and care in the maintenance of its cars and appliances in a condition of safety." (p. 211.)

In this same case, the Court stated, as to the question of burden of proof and weight of presumptions:

> "In finally determining the issue as to appellant's negligence, the jury must weigh presumptions, testimony and proofs of every character in the light of the principle that the burden of proof was upon appellee, and if, on the whole, the scale did not preponderate in favor of the presumption and against all countervailing evidence, appellee must fail." (p. 210.)

The above cited case clearly states that a presumption was raised by the prima facie case, and if that presumption is supported by substantial evidence in favor of the plaintiff's position, the case must go to the jury for decision.

Schlosser v. *Griffith*, 125 Ind. 431, 25 N. E. 459;
Norris v. *Casel*, 90 Ind. 143;
Southern Railroad Co. v. *Crone*, 51 Ind. App. 300, 99 N. E. 762.

PROPOSITION III.

It may even be said that there is ample authority for the proposition that:

Where a presumption of wrongfulness is raised by a prima facie case, the very nature of the presumption should take the question of the wrongfulness of the act to the jury, *in all cases.*

Thompson's Commentaries on the Law of Negligence (2d. Ed.), in Sec. 2773, states, in speaking of presumptions of negligence *per se:*

> "The very nature of this presumption is such that it takes the question of negligence of the defendant to the jury in all cases. It requires him to explain the accident consistently with the conclusion of due care on his part; and whether he succeeds in doing so is necessarily a question of fact for the jury. The judge can not decide that he has done so, without trying a question of fact, passing upon the credibility of witnesses, and deciding that an affirmative proposition of fact has been proved. This can not be done in any jurisdiction where the system of trial by jury is properly understood and correctly maintained. Judges who undertake to perform this office in the place of juries, usurp the office of juries, and seize a jurisdiction which, it may well be assumed, has not been committed to them by the Constitution, or the laws of any American jurisdiction, Federal or State."
>
> *Pittsburgh, etc. R. Co.* v. *Williams*, 74 Ind. 462.

It is the contention of the petitioner herein that her prima facie case raised a presumption of negligence, which, even if unsupported by *any* additional evidence, would have been sufficient to require the trial court to submit the case to the jury. The presumption of wrongfulness which is raised by the act of one man killing another is precisely the same as the presumption of negligence *per se* discussed in the *Thompson* citation, (supra).

PROPOSITION IV.

The jury is the sole judge of the credibility of the witnesses and the weight of the evidence.

Scoopmire v. *Talflinger*, 52 N. E. (2d) 728, 732, decided Feb. 1, 1944;

Cleveland etc. R. Co. v. *Starks*, 58 Ind. App. 341, 106 N. E. 653;

Wm. P. Jungclaus v. *Ratti*, 67 Ind. App., 84, 118 N. E. 966.

Argument.

"The jury are the judges not only of the weight of the evidence, but also of the credibility of the witnesses. As the former rests upon the latter, in so far as concerns oral testimony, it follows that the evidence cannot be intelligently weighed, unless the credibility of the witness has first been determined. In fact, the evidence in a case, aside from the written or documentary, is gathered only from the credible oral testimony. When a material fact is supported only by the uncorroborated testimony of a single witness, there is no reason why the jury should not subject the credibility of such witness to proper tests, even though his testimony is not contradicted by that of any other witness. If, as a result of such tests, honestly and fairly applied, the jury are unable to believe the testimony of such witness, it is not only within their power, but also it is their duty to reject it."

Cleveland, etc. R. Co. v. *Starks*, 58 Ind. App. 341, 106 N. E. 653.

In *Woodsmall* v. *Myers*, 87 Ind. App., 69, at page 72, the Court said:

"Appellant says that the undisputed evidence shows that he was a good faith purchaser. But this evidence, though undisputed by any other witness was by appellant alone. We cannot say that the evidence was in-

> sufficient to sustain the verdict because of appellant's affirmative oral testimony of facts pleaded by way of reply of which appellant had the burden of proof. The jury may have found that the reply was not established because it did not believe appellant's testimony. This it had a right to do."

In the case at hand, we have the situation in which the plaintiff has made a prima facie case, the burden of proof has shifted to the defendant to show justification for the killing, and the plaintiff has presented relevant, material and substantial countervailing evidence to rebut the testimony of the defendant and his employees. It was the jury's right and duty to decide as to what evidence they could believe, and if they chose to disregard the oral testimony of the respondent-defendant and his employees, it was their duty to do so. It was unquestionably, under the law of the State of Indiana, the jury's right to pass upon the questions involved. It was their duty to test the interest of any witness, his bias and prejudice, as important factors in considering what credit should be given to the testimony of those witnesses. Further, it was the jury's province to test the probability or improbability of the testimony of the witnesses as reflected against the background of the material facts surrounding the shooting and the evidence produced by the petitioner-plaintiff in support of her prima facie case.

In considering the credibility of the testimony of the defendant and his employees, who all gave a similar story as to the events of the shooting in their attempt to prove justification, the evidence was relevant and material on that issue, that the shooting could not have occurred in the manner in which they testified. They all placed the defendant, Clarence Wood and Robert Burdon at least sixteen feet apart, whereas the testimony of the ballistics expert, Kirby Scherer, showed that the powder burns on Burdon's face could not have been made unless Burdon and Wood were

not more than one foot apart. This piece of evidence, alone, refuted and contradicted the testimony of the defendant and his employees as to the manner in which the shooting occurred. The evidence of the destroying of the bullet, which was in the door jamb, by Merle Wood, an employee and cousin of the defendant, went to the credibility of the witness. The jury had a perfect right to draw the inference that the bullet which Merle Wood dug out of the door jamb and threw away was not out of Burdon's gun, else he would have saved it to show to the proper authorities. The fact that there was competent testimony that Robert Burdon always carried one fired shell in his gun was evidence which contradicted the testimony that Burdon had fired his gun. All of this was evidence which went to the credibility of the witnesses and to the weight of their testimony and was evidence which the plaintiff had a right to have the jury consider, and from this evidence, the jury had a right to find that the testimony of the defendant, Clarence Wood, and his employees was discredited and contradicted. The jury and the trial judge were the sole judges of the credibility of the witness and the weight of the testimony, and the Circuit Court of Appeals did not have the right to deprive the plaintiff of her right to have these issues decided by the jury.

We think the quotation in *Great Lakes Dredge, etc. Co.* v. *Totzke*, 69 Ind. App. 303, at page 308, is applicable:

> "The testimony of the witness Mr. Anderson tends to prove what counsel claim it does prove, and in the sense that no other witness testified that Mr. Anderson did not see what he claims to have seen, Mr. Anderson's testimony is undisputed. But the testimony of a witness may be so inherently weak as to be unable to stand against the facts shown by other evidence and the inferences to be drawn therefrom; or it may be so incon-

sistent with other facts and circumstances as to have little or no weight; or it may be so inherently improbable that it amounts to mere conjecture. It was the exclusive province of the Industrial Board to consider Mr. Anderson's testimony in connection with all the other evidence and to give it such weight as in the judgment of the members of the Board was fairly attributable thereto. In that respect we cannot disturb the action of the board; for there are many facts and circumstances in evidence which are inconsistent with his testimony."

See also, *Lynch* v. *Bates*, 139 Ind. 206, 38 N. E. 806; *Fox* v. *Barckman*, 178 Ind. 572, 99 N. E. 989.

The authorities above cited conclusively show, in the opinion of your petitioner, that the decision of the Circuit Court of Appeals for the Seventh Circuit, herein, was clearly at variance with the decided legal principles long established by the highest courts of the State of Indiana.

This error was due to the fact that the petitioner-plaintiff, below, established a prima facie case, raising its presumption, and supported the presumption with relevant, material and substantial evidence in support thereof. Thus, there was created a question that could only be passed on by the jury, and the Circuit Court of Appeals invaded the province of the jury when they reversed the trial court and jury's decision.

B.

The federal courts have adopted the rule that where a prima facie case has been made by a plaintiff, and where this prima facie case, raising the presumption therefrom, is supported by relevant and material evidence, even though there is undisputed and unimpeached testimony to the contrary, the case must go to the jury. In other words, the prima facie case made by the petitioner-plaintiff raised

a presumption of wrongfulness and this presumption, supported by the physical facts which are undisputed in the case at hand, together with the testimony of the plaintiff's witnesses, constituted sufficient evidence to make this a jury question only.

Booth v. *Gilbert*, 79 F. (2d), 790, 795;

Chicago M. St. P. & P. R. Co. v. *Linehan*, 66 F. (2d) 373, 380;

Liggett & Myers Tobacco Co. v. *DeParcq*, 66 F. (2d) 678, 683.

Proposition I.

The federal courts universally hold that some acts raise, necessarily, legal presumptions of wrongfulness.

In the case of *Rutherford, et al* v. *Foster, et al.*, (C. C. A. 8th Cir., 1903), 125 F. 187, the court said:

> "Some acts—for example, the killing or injury of passengers by the operation of railroad trains—are acts of negligence *per se*, and a legal presumption that the actors were negligent arises from the acts alone, and casts the burden of showing that they were not the result of negligence upon those who committed them; * * *. In the same way, there are acts that are wrongful in themselves and from which a legal presumption of unlawfulness arises, which throws the burden of proof upon those who commit them, while there are other acts which raise no presumption, and which leaves the burden upon the plaintiffs to prove facts and circumstances which show their wrongfulness. An assault and battery with a deadly weapon which produces the death of the victim is of the former class, of the same class as an injury to a passenger while riding upon a train, and from it, the presumption of wrong arises which casts the burden of establishing a justification or an excuse for it upon the perpetrator" (p. 192).

This opinion in the case above cited states the matter succinctly in the following words:

> "The legal presumption is that the killing of one man by another is wrongful and the burden is upon the defendant to plead and prove matter in justification of the act" (p. 193).

Thus, it will be seen that the federal courts are agreed with the rule stated in Sub-section A of the Argument of this Brief, which constitutes the law of the State of Indiana, as stated in *Cleveland, etc. R. Co.* v. *Hadley*, previously cited. It, therefore, further appears that it became the duty of the respondent-defendant to conclusively prove justification for the act of killing Robert Burdon.

PROPOSITION II.

Where some evidence that is relevant and material supports the legal presumption raised by the wrongful act of the defendant, thus countervailing the testimony of the adverse witnesses for the respondent-defendant, the case must go to the jury for final determination. This is due to the fact that it is the jury's province to weigh the evidence, test the credibility of the witnesses, and thus ascertain where the truth of the matter lies.

In the case of *National Labor Relations Board* vs. *Hudson Motor Car Co.* (C. C. A. 6th Cir. 1942) 128 F. (2d) 528, 532, the court said:

> "The phrase, 'substantal evidence', is far from precise and means more than a scintilla and less that the weight of the evidence. The Board's finding must be upheld unless clearly arbitrary or unless it is not confirmed by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, regardless of the evidence on the other side."

In the case of *Emanuel* vs. *Kansas City Title & Trust Co., et al.,* 127 F. (2d) 175, which was a decision of the Circuit Court of Appeals for the Eighth Circuit rendered in 1942, the court states:

> "It is elementary that in action at law, the jurors are the sole and exclusive judges of the facts, the credibility of the witnesses and of the weight of the evidence. Evidence which is uncontradicted is not necessarily to be accepted as true. Its weight and the credibility of the witnesses who gave it are usually for the jury to determine. While a jury is free to disregard the uncontradicted evidence of unimpeached and credible witnesses, it is not obliged to acknowledge as true and controlling evidence which, although uncontraverted, might be regarded as unreasonable or improbable, or from which reasonable men might draw different conclusions."

The Circuit Court of Appeals cannot be the trier of the facts, but can merely review the action of the trial court and in their investigation, they must be limited to an ascertainment of whether or not the prima facie case made by the petitioner-plaintiff, is supported by relevant and material evidence. If the Circuit Court of Appeals had examined into the evidence introduced in support of the petitioner-plaintiff's prima facie case, they could have reached only one conclusion—that being that there was relevant and material evidence in support of the plaintiff's position. It is the contention of the petitioner that since such relevant and material evidence supported the prima facie case, which had raised the proper presumption resultant from it, the Circuit Court of Appeals was clearly in error in reversing the decision of the trial court and jury.

Springman v. *Gary State Bank,* 124 F. (2d) 678, (C. C. A. for the Seventh Circuit).

C.

The United States Supreme Court has, in the past, passed on the same questions raised in the instant case. The ruling authorities shown in these cases clearly support the petitioner-plaintiff's position herein. Therefore it is the petitioner-plaintiff's further contention that the decision of the Circuit Court of Appeals is at variance with the decided law of this court. There is a strikingly similar parallel to be found between the instant case and that of the *Brig Struggle, Thomas Leigh, Claimant* v. *The United States.* This case is cited at 113 U. S. 71, 9 Cranch 71, 3 L. Ed. 660. We shall refer to this case at length under Propositions I and II of this, Sub-section C.

PROPOSITION I.

The ruling authorities of this court are in accord with the decisions cited under Sub-sections A and B of this Brief, as they pertain to the question of the legal presumption of wrongfulness raised when the plaintiff established her prima facie case.

Thus it can be confidently stated that the burden of proof is cast upon the defendant, and it remains for the defendant to show justification for the killing.

In the case at hand, the testimony of the respondent-defendant and his employees tended to show that there was justifictaion for the killing. This evidence was not uncontradicted. Rebutting evidence was afforded by the material facts surrounding the shooting, all as shown under the Statement of Facts, contained in Part I of the Petition, and by the testimony of the plaintiff's witnesses which cast doubt and incredibility upon the testimony of the adverse witnesses, the respondent and his employees.

In the respect outlined above, this case is strikingly similar to the case of the *Brig Struggle, Thomas Leigh,*

Claimant, v. *The United States*, cited above. The opinion of Justice Livingston, in this case, reads in part as follows:

> "Were the court bound to decide according to positive testimony, without regard to other circumstances, it might be difficult to say that the plea of necessity had not been satisfactorily made out. The master, mate and two of the mariners establish everything which the claimant had undertaken to prove, so far as their positive declarations are entitled to credit. But when it is recollected how many cases of fictitious distress have been offered to the courts of the United States, as excuses for violations of the restrictive system, as it has been called, and that these cases, whether real or imaginary, have generally been supported by the same species of testimony, it cannot be wondered at if this court shall receive, with considerable jealousy and caution, evidence which is so perpetually recurring, and which if compared will be found to be present the same uniform statement of facts, with very few shades of difference, all calculated to impress a belief that some overwhelming calamity, of which in ordinary voyages so little is heard, has produced a departure from the original legitimate destination of the vessel. When it is considered, too, that the testimony on these occasions come from men who, whatever their characters may be in other respects, must be viewed as accomplices in the offense, if any has been intentionally committed, and are, to say the least, very much under the influence of those who have projected the voyage and are to be gainers by a violation of the law, it cannot be supposed that such testimony can be examined without very considerable reserve and distrust."

Thus, it would appear that in the case of Brig Struggle, the captain and his crew stood in exactly the same position, with regard to their testimony, as the respondent-defendant and his employees in the instant case. Their testi-

mony was not believed by the trial court for the same reasons as were present for the rejection of the testimony of the respondent-defendant and his employees, by the jury, in the instant case. Indeed, your petitioner believes that her case presents an even stronger set of facts in support of her position than that shown in the Brig Struggle, by reason of the fact that hers is not a criminal prosecution for a crime committed, but a civil action in which it is not necessary to produce as much evidence in support of her position as it was for the prosecuting claimant in the case of the Brig Struggle, in order to prevail.

Further, it would appear to your petitioner, that the fact that she made her prima facie case, coupled with the material and substantial evidence submitted in her favor, presented sufficient evidence for the jury to pass on, and no trial court could justifiably refuse to let the case go to the jury.

It would also appear that the credibility of the witnesses is to be determined by the trial court or the trial court and jury alone, as the case may be, since as the trier of the facts, the court or the court and jury are the only ones in a position to observe the demeanor of the witnesses, test the bias and credibility of the witnesses, and thus, properly give their testimony the weight that it deserves.

Proposition II.

Mere suspicion, that does not carry the weight of a presumption, and not resting upon material evidence, and unexplained, could never support a party's position where there are strong circumstances or material evidence to the contrary, but where a prima facie case is made and where

that prima facie case is supported by relevant and material evidence, even though there may be unimpeached testimony of adverse witnesses to the contrary, there is a jury question presented which the trial court must submit. Again quoting from the *Brig Struggle, Thomas Leigh, Claimant,* v. *The United States:*

> "Although mere suspicion, not resting upon strong circumstances unexplained, should not be permitted to outweigh positive testimony in giving effect to a penal statute; yet it cannot be regarded as an oppressive rule to require of a party who has violated it to make out the vis major under which he shelters himself, so as to leave no reasonable doubt of his innocence; and if in the course of such vindication he shall pass in silence, or leave unexplained circumstances which militate strongly against the integrity of the transaction, he cannot complain if the court shall lay hold of those circumstances as reason for adjudging him in delicto."

Argument.

It is the petitioner's contention that the Circuit Court of Appeals is directly at variance with the decided authority of this court as it pertains to the precise question presented. In the instant case, the petitioner-plaintiff made a prima facie case, supported by relevant and material evidence which rebutted the testimony given by the respondent-defendant and his employees. Therefore a jury question arose which could be determined only by the triers of the facts.

D.

Argument.

It will be readily noted that although the petitioner-plaintiff has taken exception to the decision of the Circuit Court of Appeals on three grounds, those being: (1) The variance between the decision of the Circuit Court of Appeals and the decided law of the forum, the State of Indiana; (2) the variance of the Circuit Court of Appeals' decision with the decided law of other federal jurisdictions; and (3) the variance of that opinion from the decided law of this Court; there is actually only one issue involved herein. The authorities cited by your petitioner in this brief are all in accord as to this major issue. The decisions of state and federal courts are becoming universal in their similarity as applied to the precise question involved,—that question being whether or not a prima facie case supported by relevant, material and substantial evidence should go to the jury in the face of testimony produced by the adverse party. The substance and materiality of such evidence produced by the party making its prima facie case can be determined only by the trial court and jury, who are in a position to give that evidence the weight and substance it deserves. The petitioner is agreed that inference, alone, could not make her case, but she is insistent that there was such relevancy and materiality in the evidence which she produced that no trial court could refuse to let her case go to the jury, and once the credibility

of the witnesses and evidence had been weighed by the jury, that trial court could not justifiably set the verdict aside.

IT IS THEREFORE most urgently contended by your petitioner that the Circuit Court of Appeals erred in that they invaded the province of the jury in their decision reversing the District Court for the Southern District of Indiana.

Respectfully submitted,

ZOLA BURDON,
Administratrix of the Estate
of Robert Burdon, Deceased,
Petitioner,

By CHARLES M. LA FOLLETTE,
of Evansville, Indiana,
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ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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ANSWER TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

This Honorable Court will be able at a glance to see that this is not a case involving questions that justify a review by it, but it will not be able from what is said in the petition to get an accurate picture of the case. None of the assertions of fact by the attorneys for petitioner are supported by record references, as the rules require (*Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U.S. 430, 434,) for the very good reason that the record does not support many of the assertions. This Court would never learn from the petition that petitioner (plaintiff in the

District Court and appellee in the Court of Appeals) not only failed to prove that respondent wrongfuly killed her decedent without provocation on the part of the deceased, as she alleged, but that she proved by witnesses called by her that the shooting was done by respondent in defense of his person when he believed his life to be in grave danger and when the circumstances warranted such belief.

The Material Facts as Shown by the Record.

The material facts in this case are undisputed. The uncontradicted testimony of the occurrence witnesses pointed to a single conclusion,—that respondent shot deceased in self defense and that the killing was justified.

When the shooting occurred there were six men in and about the building. Three of these men, other than the deceased and the respondent, witnessed the shooting and the events leading to it. (Merl Wood, R. 14; Winchell, R. 40; Sandefur, R. 103.) The fourth man did not witness the shooting but witnessed the occurrences immediately prior and subsequent thereto. (Fambrough, R. 32.) The respondent spent the night in his trailer on the premises (R. 80) and arose about 7:30 a.m. to go to the toilet. (R. 81.) He heard loud talking in the bar room and entered it at the door leading from the yard at the south end of the bar near the southeast corner of the room. (R. 20, 81, 104.) Deceased was standing behind the bar about six feet from the south end, quarreling with Winchell, who was standing opposite him in front of the bar. (R. 21, 26, 40, 42, 44, 82, 104.) Deceased had been drinking during the night and was still drinking at the time of the quarrel. (R. 26, 38.) Winchell was on duty but deceased was not. (R. 40.) Merl Wood and Sandefur were working behind the bar. (R. 18, 103.) All those present were rightfully on the premises except deceased.

When respondent entered, he admonished deceased that all of the employees had to work together and that he wanted harmony, and he asked deceased to quit quarreling and to go home. (R. 22, 27, 42, 83, 104.) He then walked past deceased behind the bar and got a drink of water from a cooler on the bar. (R. 21, 27, 83.) Deceased did not leave as requested but continued abusing Winchell. As he returned toward the door where he had entered, respondent again asked deceased to quit quarreling and to go home. (R. 21.) Deceased turned toward respondent and angrily said, in substance, "I will go home when I damned please; I don't have to take anything from you; I will blow your damned brains out," and pulled his gun and fired at respondent. The bullet passed near respondent's head. (R. 21, 27, 42, 84, 104.) After deceased fired at respondent, respondent pulled his gun and fired two or three shots in rapid succession, one striking deceased in the face. (R. 28, 42, 85, 104.) Deceased fell behind the bar mortally wounded. (R. 20, 37, 46, 85, 105.) The bullet entered through the upper lip of deceased, just under the nose and came out at the back of his head below the crown. (R. 12, 52, 60.) The attending physician said it came out at least an inch and a half below the crown. (R. 92.) It was the opinion of the physician that the bullet took the course to be expected from the positions of the participants at the time of the shooting. (R. 93.) There were light powder burns on the face of deceased. (R. 12, 52, 60, 92.) Whether these burns were from the side expulsion of his own revolver or from the muzzle of the gun of respondent does not appear from the evidence. The shooting occurred about 7:45 a.m. (R. 15, 40) and Burdon died at the hospital in Henderson, Kentucky, about an hour later. R. 93.

After the shooting Merl Wood called the sheriff (R. 16) and a deputy sheriff called the ambulance. (R. 20, 99.)

The sheriff and a deputy arrived at the roadhouse in a few minutes (R. 28, 86) and the ambulance shortly thereafter. (R. 30.) After the shooting respondent went into the yard and waited for the sheriff. (R. 31, 43, 86.) He surrendered to the sheriff and gave him his gun (R. 48) and said, "Elmer, I had to do it." (R. 50.) Winchell, with whom deceased was quarreling, said respondent "seemed to go all to pieces" after the shooting. (R. 43.) The sheriff observed the same condition. (R. 50.) No one disturbed the body of the deceased until the sheriff arrived. (R. 16, 31, 43, 86.) The sheriff found the gun of deceased beside his body near his right hand. (R. 30, 46, 99, 105.) There was one empty shell in it. (R. 48.) The gun had just been fired. R. 49, 100, 101.

The evidence indicates that respondent was from eight to twelve feet from the deceased when the shooting started. (R. 45, 104.) Three witnesses testified that powder burns might result from a shot fired from this distance (R. 47, 97, 99) and one witness said they could not. (R. 70.) Just how far the muzzle of defendant's gun was from the face of the deceased at the time the fatal shot was fired does not appear from the evidence.

There is no evidence of ill-feeling between deceased and respondent. Respondent testified they were friendly. (R. 74.) There is conflict in the evidence as to whether deceased was quarrelsome, one witness saying he was (R. 107) and one saying he was of a quiet disposition. (R. 53.) There is no proof that respondent knew deceased was in the bar room when he entered on the morning of the shooting.

Guns were carried by respondent and by some of the employees of the Club to guard the property. (R. 39, 80.) At the time of the shooting, deceased was carrying a 32-calibre revolver (R. 46) and respondent was carrying a

380 Colt automatic. (R. 48, 66.) Some employees remained on duty at the Club overnight (R. 87) but deceased was regularly on duty at night from about 6:00 p.m. to about 2 a.m. (R. 25.) He usually rode home with Fambrough, who worked on the same shift, (R. 38,) but on this night Fambrough continued on duty as a guard. (R. 33.) There were others with whom deceased could have driven home after he quit work (R. 40-41) but he remained at the Club drinking.

Assertions of Petitioner Not Supported by the Record.

The attorneys for petitioner repeatedly assert that all occurrence witnesses were employees of respondent, often referring to them as "respondent's hirelings." The fact is that the occurrence witnesses, as well as respondent and the deceased, were employees of the Dells, Inc., a corporation. (R. 9, 24-32, 74, 101.) Respondent was president of the corporation and general manager of the roadhouse, where the shooting occurred, which was owned and operated by the corporation.

It is also asserted, without proof, that deceased remained at the roadhouse after closing time, six hours after he went off duty, waiting for a ride to his home in Henderson, the city near which the roadhouse was located. The proof does show he often rode with Fambrough (R. 38) but he had other opportunities to ride home when he finished his work on the morning of the shooting if he had wanted to accept them. (R. 40-41.) The uncontradicted testimony shows that he stayed in the bar room after working hours to drink whiskey. (R. 26, 38.) His working period ceased at 2 a.m. and he had no business on the premises after that hour. R. 25, 41.

The attorneys for petitioner assert repeatedly that the occurrence witnesses testified that respondent was sixteen

feet from deceased when the fatal shot was fired. There is no such testimony. No witness testified how far the muzzle of respondent's gun was from the face of deceased at that instant. When the shooting started, Sandefur thought the participants were about eight or ten feet apart (R. 104) and Winchell thought they were around twelve feet apart. (R. 45.) If each man moved forward on step as he shot, the muzzle of respondent's gun may well have been only a foot or so from the face of deceased when the fatal shot was fired.

The attempt of attorneys for petitioner to smear respondent by gratuitously insinuating that he was drunk at the time of the shooting falls flat. No witness suggests that respondent was intoxicated at that time or at any time during the night preceding. The only testimony on the subject was that of respondent, as a witness called by petitioner, that he had three or four highballs between 10:00 p.m. and 2:00 a.m. R. 76-78.

An anomaly established by this record is that petitioner called as her witnesses, respondent Clarence Wood (R. 66, 73) and occurrence witnesses Merl Wood (R. 14), Clarence Fambrough (R. 32) and Delbert Winchell (R. 39) and the sheriff Elmer Herrin, (R. 45,) and then proceeded by cross examination of her own witnesses to undertake to discredit them. Her attorneys now continue their smear campaign by calling the occurrence witnesses respondent's hirelings and by criticizing them for not giving first aid to deceased and by charging the sheriff with a failure to do his duty in the investigation of the case and in his custody of respondent. All of petitioner's argument against the conclusion of the Circuit Court of Appeals rests on this immaterial negative evidence and alleged inconsistencies in the testimony of witnesses called by her.

Argument in Opposition to Allowance of the Petition for the Writ.

The rule is settled by repeated decisions of the Federal courts and the courts of Kentucky, Indiana and other states that where the plaintiff has failed to meet his burden of proof and the evidence is so overwhelmingly on defendant's side that a verdict against defendant should not stand, it is the duty of the Court to declare the effect of facts proven and to direct a verdict for the defendant.

There is no dispute as to the material facts in this case. The relations of the participants in this unfortunate occurrence had always been friendly. There is a complete absence of a motive for either to shoot the other. The shooting is admitted. The circumstances of the shooting related by respondent are not only not contradicted but are corroborated by every eyewitness to the occurrence. This uncontradicted testimony points to a single conclusion,—that the respondent shot deceased in self-defense and that the killing was justified.

The respondent was president of the corporation which operated the roadhouse where the shooting occurred, was general manager of the business, and was lawfully on the premises. The deceased was an employee of the corporation and not of the respondent, as petitioner's attorneys repeatedly assert. He was not on duty at the time of the shooting and had no business in the roadhouse at the time. He was drinking and was in an ugly mood when respondent entered the building. He was giving expression to a grievance, real or fancied, against another employee who was on duty. Deceased was talking so loudly that while

respondent was in the yard his attention was attracted to the quarrel. There is no evidence that respondent knew deceased was on the premises until he entered the building. He undertook to quiet deceased and asked him to go home. This request was repeated but deceased persisted in his misconduct. Finally, without warning, deceased whirled on respondent and with an oath exclaimed that he would blow his brains out and pulled his gun and fired pointblank at respondent's head. After deceased fired at respondent, respondent pulled his gun and shot deceased. This was not an unlawful killing. It was an unfortunate occurrence, provoked by deceased's unlawful act.

Where there is no controvery as to the facts and but one reasonable inference can be drawn from them, it is the duty of the Court to declare their effect in law and direct a verdict. This rule is settled by repeated decisions of the Federal courts, the courts of Kentucky, the courts of Indiana and the courts of other jurisdictions. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 343; *Nugent* v. *Nugent's Ex'r.*, 281 Ky., 263, 135 S.W. (2d) 877, 881; *New York Central Ry. Co.* v. *Powell*, (Ind. Supr.) 47 N.E. (2d) 615, 619-621; *Jerke* v. *Delmont State Bank*, 54 S.D. 446, 223 N.W. 585, 589; *J. C. Penney, Inc.* v. *Kellermeyer*, 107 Ind. App. 253, 19 N.E. (2d) 882, 886; *Flagg* v. *Chicago Great Western Ry. Co.*, 143 Fed. (2d) 90, 93; *Troutman* v. *Mutual Life Ins. Co.*, 125 Fed. (2d) 769, 773; *Pence* v. *United States*, 121 Fed. (2d) 804, 808, affd., 316 U.S. 332; *Gorham* v. *Mutual Benefit H. & A. Assn.*, 114 Fed. (2d) 97, 99; *Farmers Nat'l. Bk.* v. *Mo. Livestock Comm. Co.*, 53 Fed. (2d) 991, 992; *Prudential Ins. Co.* v. *Tuggle's Admr.*, 254 Ky. 814, 72 S.W. (2d) 440, 442; *Agen* v. *Metropolitan Life Ins. Co.*, 105 Wis. 217, 80 N.W. 1020, 1023; *Clark's Adm'x.* v. *L. & N.R. Co.*, 101 Ky. 34, 39 S.W. 840, 842; *Bowditch* v. *Boston*, 101 U.S. 16, 18; *Park Circuit & Realty Co.* v. *Ringo's Guardian*, 242 Ky. 255, 46 S.W. (2d) 106, 109; Wigmore on Evidence, 3d Ed., Vol. 9, p. 306.

The Circuit Court of Appeals applied this sound and established rule of law in this case. Even if the rule were different in Indiana, which it is not, the Federal Court sitting in Indiana would not be governed by the contrary rule. *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 94-96; *Barrett* v. *Virginian Ry. Co.*, 250 U.S. 473, 476; *Diederich* v. *American News Co.*, 128 Fed. (2d) 144, 145.

Attorneys for petitioner seem to contend that the judgment of the Circuit Court of Appeals, which reversed the judgment of the District Court and directed it to enter a judgment sustaining respondent's motion for a directed verdict, denies to petitioner a trial by jury in violation of the Seventh Amendment. This Court and other Federal courts have ruled directly to the contrary. *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 659-661; *Galloway* v. *United States*, 319 U.S. 372, 389-395; *Conway* v. *O'Brien*, 111 Fed. (2d) 611, 613; *United States* v. *Halliday*, 116 Fed. (2d) 812, 815.

The petitioner had the burden of proving that the death of her decedent was the result of a wrongful act of respondent and this included proving that the killing was not done in self-defense.

This case is governed by the law of Kentucky. The pertinent statute provides:

> "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death from the person * * * causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered, and the action to recover such damage shall be prosecuted by the personal representative of the deceased." Ky. Stat. 1893, Chap. 252, Sec. 6, p. 1383.

In order to recover in an action governed by this statute, the personal representative must prove (1) the death of the person, (2) that the death resulted from an injury inflicted by the defendant, (3) that the act which caused the mortal injury was a negligent or wrongful act, and (4) damages.

The only element in dispute in this case was whether the act of respondent which caused the injury to petitioner's decedent was wrongful. Petitioner had the burden of proving by legal evidence that the act of respondent which caused the death of Robert Burdon was wrongful and this included proving that the shooting by respondent was not in self-defense. *Phillips Comm.* v. *Ward, Admr.*, 241 Ky. 25, 43 S.W. (2d) 331, 334; *Wilson* v. *Rollings*, 214 Ind. 155, 14 N.E. (2d) 905, 907; *Welch* v. *Creech*, 88 Wash. 429, 153 Pac. 355, 358-359; *Privitt* v. *Commonwealth*, 271 Ky. 665, 113 S.W. (2d) 49, 53.

In this case there was a complete absence of evidence that the act of respondent in shooting petitioner's decedent was wrongful or without provocation on the part of deceased, and the evidence is uncontradicted that the shooting was provoked by the unlawful act of petitioner's decedent in threatening to blow out respondent's brains and in shooting at him at close range and that respondent in fear of his life shot in self-defense. The petitioner has not only failed to meet her burden of proving that the killing was not done in self-defense and was therefore wrongful, but she has proven by witnesses called by her that the killing was justified. Under such circumstances the Circuit Court of Appeals properly held that the District Court should have declared the effect of the facts proven and directed a verdict for the respondent.

The petitioner had the burden of producing evidence necessary to establish the facts essential to her right of recovery. A verdict based on mere guess cannot stand.

The petitioner's burden of proof required her to produce evidence which took her case outside the realm of speculation, conjecture and surmise, and which created a factual basis from which a reasonable inference of liability of the respondent could be drawn. A verdict must rest upon something more than a guess. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 344; *Prudential Ins. Co.* v. *Tuggle's Admr.*, 254 Ky. 814, 72 S. W. (2d), 440, 442; *Kidd* v. *Modern Amusement Co.*, 252 Ky. 386, 67 S. W. (2d) 466, 467; *Mutual Life Ins. Co.* v. *Hassing*, 134 Fed. (2d) 714, 717; *Troutman* v. *Mutual Life Ins. Co.*, 125 Fed. (2d) 769, 772; *Hughes* v. *Cincinnati N. O. & T. P. R. Co.*, 91 Ky. 526, 16 S. W. 275, 276; *Southern Ry. Co.* v. *Stewart*, 119 Fed. (2d) 85, 89.

Where the plaintiff's right of recovery depends upon the existence of a particular fact which must be inferred from the proven facts and there is positive and uncontradicted testimony of unimpeached witnesses that the facts sought to be inferred did not exist, the desired inference is precluded. A rebuttable inference of fact must yield to credible evidence of the actual fact. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 340; *Webber's Adm'x.* v. *L. & N. R. Co.*, 261 Ky. 257, 87 S. W. (2d) 348, 351; *New York Cent. R. Co.* v. *Green*, 105 Ind. App. 488, 15 N. E. (2d) 748, 751; *Lohr* v. *Barkman Cartage Co.*, 335 Ill. 335, 340, 167 N. E. 35, 37; *Fleegar* v. *Consumers Power Co.*, 262 Mich. 537, 247 N. W. 741, 744.

The argument of the facts in the petition proceeds from the premise that when a killing by shooting is admitted there is a presumption that the shooting was unprovoked and unlawful. There is no such presumption. Occasion-

ally courts have stated that a defendant who admits the shooting of another has the burden of coming forward with proof which overcomes the "presumption" that the shooting was unlawful, but this is an inaccurate use of the word "presumption". What is meant in such statements is that where the proof shows a killing by shooting, and nothing more, the natural and reasonable *inference* to be drawn from this proof is that the shooting was unlawful because there is no proof showing excuse or justification. In the case at bar, the same proof which showed the killing also established without contradiction that the killing was in self-defense. In the face of this proof of justification for the killing there is no basis in the proof in this case upon which an inference of unlawful killing could rest. The only natural and reasonable inference that can be drawn from the proof at bar is that the killing of deceased resulted from his unprovoked assault upon respondent and that respondent believed and had reasonable ground to believe that he had to kill deceased to save his own life.

Attorneys for petitioner undertake to distinguish *Pennsylvania R. R. Co.* v. *Chamberlain*, 288 U. S. 333, and other cases cited in the opinion of the Circuit Court of Appeals, on the ground that these cases do not involve a killing by shooting. The rule that an inference of wrongdoing cannot be drawn without proof on which to base the inference is the same in all tort cases. If the proof showed that the deceased was killed by being struck by an automobile of defendant, and nothing more, the natural and reasonable inference would be that the killing was the result of the negligence of defendant. If the same proof which showed that deceased was killed by being struck by the automobile also showed that deceased, in disregard of his own safety, ran in front of the automobile, and that defendant was in no wise at fault, then the only natural inference that could be drawn from such proof would be that the killing was

excusable. (*Richardson* v. *Williams*, 249 Mich. 350, 228 N. W. 766, 768.) No useful purpose is served in the assumed situation or in a situation like the one at bar by indulging in a lot of metaphysical discussion about who has the burden of proof. Where the proof is all one way, as it is in the case at bar, then only one inference can be drawn from that proof and only one verdict can be sustained.

Rutherford v. *Foster*, 125 Fed. 187, cited at pages 12 and 32 of the petition, merely approved an instruction which stated that it is presumed that the killing of a human being is wrongful and that the accused has the burden of justifying the assault. This case, as well as *Powers* v. *Russell*, 13 Pick. 69, cited to support it, recognizes the generally accepted rule that where the proof on both sides applies to the same issue of fact the party whose case requires the establishment of that fact has the burden of proof. This is merely another way of saying that the plaintiff always has the burden of proving whatever elements are essential to recovery. (*New York Life Ins. Co.* v. *Taylor*, 143 Fed. (2d) 14, 17.) All *Rutherford* v. *Foster* and similar cases hold is that when it is established by a plaintiff in an action for wrongful death that his decedent was killed by the defendant, he has made a *prima facie* case, unless the evidence offered by the plaintiff also shows facts which excuse or justify the killing. If excuse or justification is not shown by the plaintiff's evidence, then the defendant has the burden of producing evidence which will excuse or justify. Where, as in this case, every witness testifying to the killing testified to facts which show that the deceased addressed respondent with an oath, threatened to blow out his brains, and fired pointblank at respondent, and that respondent had no opportunity to retreat and fired at deceased in self-defense, no case can be found which indulges in an academic discussion of who has the burden of proof. The Court in *Gorham* v. *Mutual Benefit H. & A. Assn.*,

114 Fed. (2d) 97, 100, had in mind a case like that at bar when it said that "metaphysical reasoning about presumption and burden of proof should not be permitted to obscure the real issue, as has been done in so many cases. If * * * the evidence is so clear as to leave no room to doubt what the fact is, the question is one of law, and it is the right and duty of the judge to direct a verdict."

Every occurrence witness that testified in this case testified that respondent was peacefully going about his business when petitioner's decedent, without provocation and with the threat that he would blow out respondent's brains, pulled his gun and fired pointblank at respondent's head. It was fortutious that respondent was not killed. The evidence shows that his life was saved by his killing his assailant. There is no dispute in the evidence. There is no room for an inference from the proven facts that the killing of petitioner's decedent was a wrongful and unprovoked act.

The petitioner did not rest her case on a presumption that shooting is a wrongful act, as the argument of petitioner's attorneys would lead one to believe, but she produced eyewitnesses who testified to facts which proved that the shooting was justified. When this direct evidence appeared, whatever presumption might have arisen from an unexplained shooting disappeared. A presumption never survives disclosed facts. *Lincoln* v. *French*, 105 U. S. 614, 617; *Kaiser* v. *Hoppel*, 219 Ind. 28, 36 N. E. (2d) 784, 786; *Richardson* v. *Williams*, 249 Mich. 350, 228 N. W. 766, 768; *Prudential Ins. Co.* v. *Tuggle's Admr.*, 254 Ky. 814, 72 S. W. (2d) 440, 442; *Osborne* v. *Osborne*, 325 Ill. 229, 231, 156 N. E. 306, 307; *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 339; Wigmore on Evidence, 3rd Ed., Vol. 9, p. 289.

The first case cited to this proposition announces the well-known and oft-repeated rule of law regarding

presumptions. There this Court said (105 U. S. 617):

> "Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear."

We do not have a case where the proven facts give support to each of two inconsistent inferences. There can be no inference that the shooting of petitioner's decedent by respondent was unprovoked and wrongful in the face of uncontradicted testimony of unimpeached witnesses that respondent was violently assaulted by petitioner's decedent without provocation; that a direct threat upon his life was translated into action by petitioner's decedent shooting pointblank at respondent at close range; that respondent had no opportunity to retreat and that his only apparent avenue of escape from death was to kill his assailant. This case is barren even of a suggestion of an explanation for the shooting of deceased by respondent, except that it was done in self-defense. The uncontradicted testimony of respondent is that his relations with deceased had always been friendly. There is an entire absence of facts from which any reasonable inference of wrongful conduct on the part of respondent can be drawn.

The testimony of witnesses produced by petitioner which stands uncontradicted and unexplained cannot be ignored. Where it disproves facts essential to petitioner's case, it is fatal to the case.

Where the burden is on the plaintiff to prove a fact and he introduces witnesses to prove that fact and their testimony not only fails to prove the fact but disproves it, the plaintiff cannot successfully contend that the fact may be inferred because of the character of the witnesses or of their testimony. *Bowditch* v. *Boston*, 101 U. S. 16, 22;

Manchester Bank v. *Harrington*, (Mo. Supr.) 199 S. W. 242, 249; *Russell* v. *Scharfe*, 76 Ind. App. 191, 130 N. E. 437, 439; *C. & O. Ry. Co.* v. *Martin*, 283 U. S. 209, 214; *Penn Oil Co.* v. *Vacuum Oil Co.*, 48 Fed. (2d) 1008, 1011; *Roberts* v. *Chicago City Ry.*, 262 Ill. 228, 232, 104 N. E. 708, 710.

Let it be remembered that the petitioner called as her witnesses the defendant, Clarence Wood, the eyewitnesses, Merl Wood and Delbert Winchell, the occurrence witness, Clarence Fambrough, and the sheriff, Elmer Herrin. All of these witnesses were subjected to cross examination by petitioner's attorneys and the whole course of their examination seemed to be to prove out of the mouths of these eyewitnesses that the shooting did not take place under the circumstances described by them. There was an attempt to smear the witnesses by insinuation and innuendo. This attempt by petitioner's attorneys to break down witnesses called by them failed utterly. Their testimony was straightforward and established its trustworthiness. Even if the petitioner did cast suspicion upon her own witnesses, she cannot reject their uncontradicted testimony. Having introduced these witnesses, she was bound by what they said, unless she produced other witnesses to prove that what the witnesses who testified said was not true. This she did not do.

Nor can she find in the testimony produced by the respondent anything to contradict the testimony given by her own witnesses. Bernard Sandefur, an eyewitness, testified positively that respondent did not assault deceased until deceased had threatened respondent's life and put his threat into action by shooting pointblank at respondent's head at close range. This witness was working at the Chrysler plant at Evansville, Indiana, at the time of the trial, and there is no reason to believe he was not telling the truth, the whole truth and nothing but the truth.

As was said by this Court in *Bowditch* v. *Boston*, 101 U. S. 16, respecting a similar situation (p. 22):

> "These witnesses are unimpeached and uncontradicted, and what they say is conclusive. It is unnecessary to refer particularly to the rest of the testimony. Nothing is to be found in it in conflict with the parts we have quoted. It affords no ground for a plausible conjecture that the facts were otherwise. The plaintiff not only failed to prove what he claimed, but his own testimony counter-proved it and established the negative. The proposition was vital to his case."

Testimony of a party favorable to himself given as a witness called by his adversary must be taken as true unless it is impeached. *Coonrad* v. *Kelly*, 119 Fed. 841, 846; *Felski* v. *Zeidman*, 281 Pa. 419, 126 Atl. 794, 795; *Luthy* v. *Paradis*, 299 Ill. 380, 383, 132 N. E. 556, 557; *Chance* v. *Kinsella*, 310 Ill. 515, 523, 142 N. E. 194; *Fleegar* v. *Consumers Power Co.*, 262 Mich. 537, 247 N. W. 741, 743; *Manchester Bank* v. *Harrington* (Mo. Supr.) 199 S. W. 242, 248; *Jerke* v. *Delmont State Bank*, 54 S. D. 446, 223 N. W. 585, 591.

Respondent, as a witness called by petitioner, testified that he and the deceased had been good friends; that no hard feeling had ever existed between them; that he came into the room where the shooting occurred because he was attracted by the loud talking of deceased; that he found deceased, who was not then on duty, engaged in an argument with another employee, who was on duty; that he asked deceased several times to cease quarreling and to go home; that deceased, without warning or provocation, threatened his life and accompanied the threat by shooting pointblank at his head at close range; that he did not pull his gun until after deceased shot at him and that he then fired twice in rapid succession in defense of his life; that

he went to pieces after the shooting and went into the yard to wait for the sheriff; and that he surrendered to the sheriff and was later exonerated by the coroner's jury and the grand jury.

None of respondent's testimony is contradicted. It is corroborated not only by witnesses called in his own defense but by other witnesses called by petitioner. The facts established by this uncontradicted evidence are fatal to petitioner's case. The decision of the Circuit Court of Appeals is the only decision which could have been made which can be justified on this record.

There is not present in this case a single question which justifies a review of this record by this Court. The decision of the Circuit Court of Appeals in this case is in harmony with decisions of this Court, with the decisions of other Circuit Courts of Appeals, and with the decisions of the highest courts of Indiana, Kentucky and other states. No question of federal law is presented by the record and there has been no departure from the accepted course of judicial proceedings. We submit that the highest court of the country should not have its time and energy consumed by reviewing records in cases involving only issues of fact. (*Southern Pacific Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U. S. 508.) There is certainly no special or important reason apparent in this case which should impel this Court in the exercise of a sound judicial descretion to award the writ. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393.

Respectfully submitted,

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